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Connor R. Adamson

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2019]

# LOWERING THE BAR?: REEVALUATING THE DILIGENT PROSECUTION BAR IN LIGHT OF THE GOLD KING MINE SPILL

In August 2015, the Gold King Mine spewed three million gallons of wastewater into rivers throughout the southwest United States.<sup>1</sup> The mine, tainted with a variety of material, dyed long stretches of water an “eerie orange-yellow” not unlike a Hollywood drama film.<sup>2</sup> The Environmental Protection Agency (EPA) revealed that one of its crews ultimately triggered the spill, causing widespread damage to wells, crops, and pastures.<sup>3</sup> The EPA initially assured those harmed it would repay their damages, but announced in January 2017 it would not repay claims for economic damages.<sup>4</sup> The sum of the seventy-three claims filed was over 1.2 billion dollars.<sup>5</sup>

In justifying its decision, the EPA claimed the Federal Tort Claims Act did not allow them to repay claims resulting from discretionary government actions.<sup>6</sup> Rather, EPA spokespersons asserted Congress designed the law to protect the decision-making ability of government agencies against threatened litigation.<sup>7</sup> Many expressed outrage at the EPA’s decision, including several members of Congress.<sup>8</sup> The State of Utah, among others, filed suit against the EPA in an effort to recover these damages.<sup>9</sup> As of the date of

1. See Associated Press, *EPA Says it Won’t Repay Claims for Spill That Caused Yellow Rivers*, CBS NEWS (Jan. 13, 2017), <https://www.cbsnews.com/news/gold-king-mine-spill-colorado-rivers-epa-claims> (describing environmental damage caused by spill).

2. *Id.* (clarifying effects of environmental damage to rivers throughout spill area).

3. Dan Elliott, *EPA says it can’t pay economic damages from mine spill*, ASSOCIATED PRESS (Jan. 13, 2017), <https://apnews.com/a8ae2e2996d745a3944912968742a948/apnewsbreak-epa-says-it-cant-pay-damages-mine-spill> (assessing responsibility for mine spill).

4. *Id.* (describing actions of EPA in wake of incident).

5. *Id.* (explaining sum of claims filed against EPA). A variety of private property owners, including farmers, rafting companies, and homeowners, filed claims. *Id.*

6. *January 13, 2017 Decision*, DECISION ON FEDERAL TORT CLAIMS ACT CLAIMS (Jan. 13, 2017), <https://www.epa.gov/goldkingmine/decision-federal-tort-claims-act-claims> (announcing decision and reasoning underlying lack of repayment).

7. See *id.* (describing EPA’s interpretation of Congress’s intent in extending sovereign immunity under FTCA).

8. Elliott, *supra* note 3 (explaining various reactions of congressmen).

9. Associated Press, *2 Years After a Huge Colorado Mine Spill Polluted Utah Rivers, the State is Suing the EPA*, THE SALT LAKE TRIBUNE (Jan. 6, 2018), <https://www.sltrib>

this Comment, the various cases have been consolidated by the Judicial Panel on Multidistrict Litigation into a singular action in the District of New Mexico.<sup>10</sup>

In addition to the state of Utah, many private citizens also had claims to bring against the EPA.<sup>11</sup> Though the EPA claimed sovereign immunity under the Federal Tort Claims Act, there is potential for a cause of action under the Solid Waste Disposal Act.<sup>12</sup> This act, like most environmental acts, provides an avenue for citizens to bring their suits.<sup>13</sup> Under the Eleventh Amendment, a private citizen cannot sue a government entity without the legislature creating a private cause of action.<sup>14</sup> Environmental statutes, such as the Solid Waste Disposal Act, create private rights of action for environmental harm covered under each statute.<sup>15</sup> Still, private citizens may encounter additional stumbling blocks to recovery in the form of diligent prosecution bars, which are prolific within environmental statutes.<sup>16</sup> The bar prevents citizen suits when the government is diligently pursuing action against the offender in a court of law.<sup>17</sup> This includes completed government actions in which some form of decree or order has been entered against the offender.<sup>18</sup> Courts justify the existence of the bars with the rationalization that citizen suits are secondary to government action.<sup>19</sup>

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.com/news/environment/2018/01/06/2-years-after-a-huge-colorado-mine-spill-that-polluted-utah-rivers-the-state-is-suing-the-epa (describing actions of Utah in relation to mine spill).

10. In re Gold King Mine Release in San Juan Cty., 291 F. Supp. 3d 1373, 1375 (J.P.M.L. 2018) (consolidating pending cases into singular action).

11. Elliott, *supra* note 3 (describing variety of claims brought by private land owners).

12. See generally 42 U.S.C. § 6972 (1984) (providing for citizen suits for violation of waste disposal standards).

13. *Id.* (creating cause of action for citizen suits); see also 33 U.S.C. § 1365 (2012) (creating action for violation of Clean Water Act).

14. See U.S. CONST. amend. XI (limiting jurisdiction of federal courts). The Supreme Court clarified that the Eleventh Amendment reflects a broader principle of sovereign immunity, and states could not be subjected to private suits as means of obtaining plaintiff's objectives. Alden v. Maine, 527 U.S. 706, 728 (1999).

15. 42 U.S.C. § 6972 (2012) (mirroring private right of action present in most environmental statutes).

16. See § 6972 (b)(1)(B) (describing provision referred to as diligent prosecution bar).

17. *Id.* (limiting extent of suits by private citizens).

18. See *id.* (specifying action prohibited when compliance with order is being pursued).

19. See Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (describing purpose of citizen suits as matter of policy).

This Comment will explore whether the diligent prosecution bar best serves the interests of citizens.<sup>20</sup> Despite claims that the government is best suited to enforce environmental action, the actions by the EPA in the Gold King Mine case demonstrate how government can cause environmental destruction.<sup>21</sup> This Comment will analyze the diligent prosecution bar for three different environmental acts and how courts have applied it.<sup>22</sup> This Comment will further decide whether the bar truly benefits citizens or overly inhibits citizens from vindicating their interests.<sup>23</sup>

# I. DEPTHS OF THE MINE: THE BACKGROUND OF THE DILIGENT PROSECUTION BAR

The diligent prosecution bar is a provision in all environmental acts.<sup>24</sup> Environmental statutes contain citizen suit provisions, which allow private citizens to launch civil suits to redress harms arising from environmental pollution or other damages.<sup>25</sup> While the type of pollution covered varies from act to act, the provisions of the diligent prosecution bar remain the same.<sup>26</sup> The bar prevents citizens from filing suit when the federal or state government is diligently prosecuting an environmental offender.<sup>27</sup>

The Supreme Court has stated citizen suits should be secondary to government enforcement.<sup>28</sup> They should not overshadow or replace action by the government in enforcing environmental law.<sup>29</sup> This section of the Comment will examine the diligent prosecution bar within three different environmental acts and the sub-

20. See *infra* notes 103-211 and accompanying text (examining policy behind diligent prosecution bar and effects upon citizens).

21. Associated Press, *supra* note 1 (noting EPA is responsible for spillage into rivers).

22. See *infra* notes 24-102 and accompanying text (describing effect of each statute and courts' analyses and interpretations of statute's text).

23. See *infra* notes 212-251 and accompanying text (suggesting future interpretation of diligent prosecution bar and most beneficial use).

24. Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91 (2003) (noting presence of diligent prosecution bar in all environmental statutes).

25. See *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) (describing role of citizen suits as private attorney generals in environmental context).

26. See *infra* notes 32-102 and accompanying text (noting similarity of bar in all three statutes).

27. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (2012) (preventing suit under certain circumstances).

28. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) (finding private action unnecessary where government already commenced action).

29. See *id.* at 60 (explaining citizen action should be deferential to government).

sequent history since Congress adopted the acts.<sup>30</sup> While the Clean Water Act has one of the most comprehensive diligent prosecution bars, each of the acts examined has case history further defining the bar's application and the subsequent impact.<sup>31</sup>

#### A. Clean Water Act

Congress first enacted the Water Pollution Prevention and Control Act in 1948.<sup>32</sup> The law is comprehensive, providing goals for research, grants for construction projects, and overall regulatory standards.<sup>33</sup> Congress subsequently passed the Clean Water Act in 1972 as a series of amendments to the Water Pollution Prevention and Control Act.<sup>34</sup> These amendments contained the citizen suit provisions common to most environmental statutes.<sup>35</sup> The provision creates a cause of action against another individual or government actors who violate the Act's standards.<sup>36</sup> Alternatively, the provision allows suit against the EPA Administrator when they allegedly fail to complete a non-discretionary duty under the Act.<sup>37</sup>

Within the Act's citizen suit provisions, there is also the diligent prosecution bar.<sup>38</sup> It provides no action may be commenced if the government "is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right."<sup>39</sup> Another provision notes the prosecution bar does not inhibit the common law rights of citizens.<sup>40</sup> Legal scholars consider

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30. See *infra* notes 32-102 and accompanying text (analyzing history of bar within three different statutes).

31. See *infra* notes 32-102 and accompanying text (examining bar within three different statutes and interpretation by courts).

32. See generally 33 U.S.C. § 1251 (2012) (stating purpose of restoring and maintaining clean waterways).

33. See generally §§ 1251-1377 (setting forth substantive provisions).

34. Appel, *supra* note 24, at 94 (describing history of Clean Water Act).

35. 33 U.S.C. § 1365 (b)(1)(B) (2012) (describing diligent prosecution bar).

36. § 1365 (explaining when citizens can sue).

37. § 1365(a)(2) (setting up alternate means of suit). The Administrator refers to the Administrator of the Environmental Protection Agency who is given authority to administer the provisions of the law. § 1251(d).

38. § 1365(b)(1)(B) (describing how suit might be barred from action).

39. *Id.* (detailing conditions for stoppage of suit).

40. See 33 U.S.C. § 1365(e) (2012) (listing broad exception to other provisions of citizen suits).

the diligent prosecution bar here as one of the more comprehensive among environmental statutes.<sup>41</sup>

The United States Supreme Court and circuit courts have clarified several provisions of the Act's diligent prosecution bar.<sup>42</sup> In a 1987 decision, the Supreme Court noted citizen suits were no longer necessary if the government is pursuing action against the offender.<sup>43</sup> In the same decision, the Supreme Court continued to note the primary role of citizen suits is to "supplement rather than to supplant government action."<sup>44</sup> The Court elaborated that the legislative history supports this viewpoint and this prevents suits for past violations of the Act.<sup>45</sup> This belies a belief that citizens suing on top of government enforcement would only be intrusive.<sup>46</sup> The Court found this would curtail the effective enforcement power of the government.<sup>47</sup> More recently, the Fifth Circuit Court of Appeals further added that the diligent prosecution bar is not a jurisdictional requirement.<sup>48</sup> This is largely a matter of civil procedure, determining whether a federal court would have jurisdiction to hear a citizen suit under the Act.<sup>49</sup> The greater importance of this decision is the motion to dismiss is proper for a defendant to file.<sup>50</sup>

While courts agree the bar is not a jurisdictional requirement, the circuit courts remain split on what constitutes a diligent prosecution.<sup>51</sup> The Ninth Circuit Court of Appeals embraces a narrow

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41. See Appel, *supra* note 24, at 92 (describing bar of Clean Water Act as most extensive).

42. See *infra* notes 43-56 and accompanying text (examining development of diligent prosecution bar under courts rulings).

43. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 59-60 (1987) (noting legislature intended for State government to enforce majority of violations).

44. *Id.* at 60 (defining relation of citizen suits to government action).

45. See *id.* at 60-62 (furthering background in support of citizen suits' minor role).

46. See *id.* at 61 (correcting false beliefs of respondents in case).

47. *Id.* (arguing government power would be weakened by other interpretation of law).

48. See *generally* *Louisiana Env'tl. Action Network v. Baton Rouge*, 677 F.3d 737, 747-49 (5th Cir. 2012) (describing why diligent prosecution bar was not intended to be jurisdictional requirement).

49. See *id.* at 745 (explaining implications of deciding whether bar is jurisdictional).

50. See *id.* (describing evidentiary inferences granted if bar is not jurisdictional); see *generally* FED. R. CIV. P. 12 (creating basis for motions to dismiss in federal court).

51. See Patrick Kurtas, *Lowering The Bar: The Sixth Circuit Embraces The Ninth Circuit's Narrow Interpretation Of Section 1319(g)(6) Of The Clean Water Act in Rudolph Jones, Jr.; Susan Jones; Tandy Jones Gilliland v. City of Lakeland, Tennessee*, 12 VILL. ENVTL. L.J. 235, 237-38 (2001) (describing how circuit courts are split on diligent prosecution bar).

view of the provision only barring citizen suits in limited circumstances.<sup>52</sup> The First Circuit Court of Appeals, in contrast, bars far more citizen suits due to a more expansive definition of what government action satisfies the Act's language.<sup>53</sup> The Sixth Circuit Court of Appeals recently moved towards the growing trend to narrow the ability of citizens to sue under the Clean Water Act.<sup>54</sup> Referring to the Supreme Court's rulings on the role of citizen suits, the Sixth Circuit affirmed the narrow role of citizen suits and the limited provisions covered.<sup>55</sup> The court justified its expansive reading of the bar and again noted citizen suits are secondary to government action.<sup>56</sup>

## B. Clean Air Act

The Air Pollution Prevention and Control Act, also known as the Clean Air Act, was initially enacted in 1955 as general awareness of air pollution began to grow.<sup>57</sup> Not unlike the Clean Water Act, the law was designed to regulate pollution and air quality throughout the nation.<sup>58</sup> The law is comprehensive, providing detailed standards for air quality, federal enforcement of the law, penalties for noncompliance, and emission standards.<sup>59</sup> Additionally, the law contains provisions protecting the ozone layer and, perhaps surprisingly, limitations for noise pollution and acid deposition control.<sup>60</sup>

Contained within the general provisions part of the statute is the private right of action.<sup>61</sup> Like the Clean Air Act, this provision provides a basis for private parties to file suits for violations of the

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52. *See id.* at 245-46 (explaining Ninth Circuit's rulings on meaning of diligent prosecution bar).

53. *See id.* at 243 (describing First Circuit's view of bar and implications of interpretation).

54. *See Askins v. Ohio Dep't of Agriculture*, 809 F.3d 868, 877 (6th Cir. 2016) (ruling suit is precluded under Clean Water Act).

55. *See id.* at 875 (explaining Congress would have allowed more suits if it intended to).

56. *Id.* (arguing expansive reading asked for by *Askins* would give citizens more enforcement power than EPA).

57. *See generally* 42 U.S.C. § 7401 (2012) (passing law into effect at specified date).

58. *See id.* (stating general purpose of legislation).

59. *See generally* §§ 7401-7590 (describing various subsections of law and what they entail).

60. *See generally* §§ 7641-7671 (setting out standards for curbing of various types of pollution).

61. 42 U.S.C. § 7604 (describing what provisions entail and various requirements underneath standard).

Act.<sup>62</sup> The Clean Air Act's citizen suit provision served as a base for the Clean Water Act's provision.<sup>63</sup> The Clean Air Act was the first environmental statute to grant a private right of action.<sup>64</sup> Logically, the diligent prosecution bar in the Clean Air Act is worded almost exactly the same as the Clean Water Act.<sup>65</sup> The key difference between the two is the Clean Air Act's bar does not prohibit a claim if the government is pursuing a criminal action, only a civil one.<sup>66</sup>

Along with the similar statutory language, federal courts have interpreted the language of the statute similarly.<sup>67</sup> Like the bar in the Clean Water Act, the bar here is not a jurisdictional limitation, and, as such, claims cannot be dismissed for a lack of jurisdiction under the bar, only for failure to state a claim.<sup>68</sup> Generally, the standards for what government action constitutes a "diligent prosecution" are also similar under the Clean Water Act.<sup>69</sup>

Courts have more precisely defined the types of government action constituting a bar under this Act.<sup>70</sup> For example, in a recent decision tilting against private suits, the Third Circuit Court of Appeals stated the mere presence of litigation in court will prohibit a citizen suit "as well as after the litigation has been terminated by a final judgment, consent decree, or consent order and agreement."<sup>71</sup> Any attempt to enforce the same regulatory standard the EPA has already brought action for will trigger the diligent prosecu-

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62. § 7604(a)(1) (creating private cause of action for violation of standards under act).

63. See Kurtas, *supra* note 51, at 235 n.3 (2001) (describing basis of citizen suit provision for CWA).

64. See Appel, *supra* note 24, at 94 (noting historical relevance of citizen suit provision).

65. Compare § 7604(b)(1)(B) with 33 U.S.C. § 1365(b)(1)(B) (limiting when citizen suits may occur and when they may not).

66. § 7604(b)(1)(B) (carving out narrow exception for citizen suits to occur in). The statute reads, in key part, "[n]o action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order . . ." *Id.*

67. See *infra* notes 68-81 and accompanying text (reviewing similar statutory history and interpretation as Clean Water Act).

68. See *Group Against Smog & Pollution, Inc. v. Shenango, Inc.*, 810 F.3d 116, 126 (3d Cir. 2016) (finding Congress did not mandate bar jurisdictional and thus should not be found jurisdictional).

69. See *supra* notes 51-56 (describing standards of diligent prosecution bar of Clean Water Act).

70. See *infra* notes 71-81 and accompanying text (drawing sharper lines on types of actions covered by bar).

71. *Shenango*, 810 F.3d at 132 (ruling on standards of when citizen suits are precluded by diligent prosecution bar).



tion bar.<sup>72</sup> Courts conclude the bar in this Act serves the same purpose as the Clean Water Act bar: to prevent redundant litigation.<sup>73</sup> The court's logic is that only one method of enforcement is necessary.<sup>74</sup> It is crucial to look at whether the government action encompasses all the claims the private party brought.<sup>75</sup>

Despite narrow limitations imposed by the bar, actions brought to enforce a different regulatory standard than the one the government is enforcing are allowed.<sup>76</sup> The action would not be redundant, as it would be pursuing relief for a different violation.<sup>77</sup> Pending state administrative actions do not constitute a bar either, as they are not actions within a court of law.<sup>78</sup> Despite these allowances, the bar still restricts private action even where the government does not achieve the outcome desired by the private citizen.<sup>79</sup> Moreover, even if the regulated party is still violating the terms of an EPA consent decree, the private citizen is still barred from suing.<sup>80</sup> The court stated the only necessary analysis to determine if an action is diligently prosecuted is if the government enforcement is capable of bringing the violator into compliance with the act.<sup>81</sup>

### C. Solid Waste Disposal Act

The Solid Waste Disposal Act, otherwise known as the Resource Conservation and Recovery Act (RCRA), was originally passed in 1965 amid growing concerns for environmental cleanli-

72. See *Maryland Waste Coal. v. SCM Corp.*, 616 F. Supp. 1474, 1483 (D. Md. 1985) (finding it would defeat purpose of citizen suit provision to prevent suit for all related provisions).

73. See *id.* (arguing where EPA has already found violation and enforced against it, citizen suits are not necessary).

74. See *id.* (concluding EPA action is only action needed).

75. See *Moran v. Vaccaro*, 684 F. Supp. 1201, 1206 (S.D.N.Y. 1988) (dismissing case due to EPA action encompassing all parts of plaintiff's claim).

76. See *id.* (noting dismissal would not have been proper had EPA's complaint not addressed all continuing incidents related to citizens' allegations of Clean Air Act violations).

77. See *Maryland Waste Coal.*, 616 F. Supp. at 1483 (blocking action only because EPA is already enforcing for same violation).

78. See *id.* at 1481 (assessing precedent to determine administrative actions of Maryland Department do not constitute bar).

79. See *Citizens for Clean Power v. Indian River Power, LLC*, 636 F. Supp. 2d 351, 357 (D. Del. 2009) (finding citizens' preference for more stringent standard irrelevant in decision making).

80. See *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., LLC*, 500 F. Supp. 2d 592, 606 (E.D. La. 2007) (stating monthly violations of agreement are acceptable due to agreement being in place).

81. See *id.* at 606-07 (detailing EPA decree's demands and evidence violator is already beginning to follow decree).

ness.<sup>82</sup> In addition to the statute's general provisions, it creates an Office of Solid Waste and lays out the authorities of the Administrator.<sup>83</sup> The statute also describes plans for states to follow and other federal duties and responsibilities under the Act.<sup>84</sup> Plans for research and development are set out as well as separate provisions for regulation of underground storage tanks and medical waste disposal.<sup>85</sup> Of most relevance to this Comment, the Solid Waste Disposal Act also contains a citizen suit provision.<sup>86</sup>

The citizen suit provision in the Solid Waste Disposal Act uses nearly identical language to the previous two statutes, though the courts' statutory construction has subtle differences.<sup>87</sup> The language of the diligent prosecution bar is identical to the provision in the Clean Water Act, barring suit when the government is pursuing either a civil or criminal action.<sup>88</sup> Courts have interpreted the provisions of both statutes in a similar manner as well, determining, for instance, that the diligent prosecution bar is not a jurisdictional requirement.<sup>89</sup> Administrative proceedings also do not constitute "actions" under the statute, as they do not occur in federal court.<sup>90</sup>

As part of RCRA, litigants have challenged the diligent prosecution bar due to its relation with the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA).<sup>91</sup> CERCLA is another federal law providing for citizen suits relating to improper disposal of waste.<sup>92</sup> Despite the similarity of the claims,

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82. See 42 U.S.C. § 6901 (2012) (noting when statute was passed and series of amendments to it).

83. See 42 U.S.C. §§ 6911-6916 (describing authorities of Administrator, duties, labeling requirements, and various other provisions).

84. See 42 U.S.C. §§ 6941-6966 (describing application of state and local law to statute, position of EPA, and administrative responsibilities).

85. See 42 U.S.C. §§ 6991-6992 (laying out requirements of waste disposal under these portions of act).

86. 42 U.S.C. § 6972 (creating private right of action).

87. Compare 42 U.S.C. § 6972(b)(1)(B) with 42 U.S.C. § 7604(b)(1)(B) and 33 U.S.C. § 1365(b)(1)(B) (limiting when citizen suits may occur and when they may not).

88. Compare 42 U.S.C. § 6972(b)(1)(B) with 33 U.S.C. § 1365(b)(1)(B) (barring claims in exact same manner).

89. See *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 492 (7th Cir. 2011) (holding Congress could have made claims expressly jurisdictional if desired).

90. *Esso Standard Oil Co. v. Rodriguez-Perez*, 455 F.3d 1, 6 (1st Cir. 2006) (finding administrative proceeding of Puerto Rico as not raising bar).

91. See *United States v. Colorado*, 990 F.2d 1565, 1575-76 (10th Cir. 1993) (analyzing relationship between CERCLA and RCRA).

92. See generally 42 U.S.C. §§ 9601-9675 (detailing comprehensive liability for environmental claims and providing standards for enforcement).

a district court found the bar does not prevent a claim under the RCRA when an action is already in court under CERCLA.<sup>93</sup>

The courts have also been lenient towards plaintiffs in allowing similar claims under the RCRA.<sup>94</sup> Small differences in remedial actions and contaminants were enough to lead the First Circuit Court of Appeals to rule the bar did not apply to such suits.<sup>95</sup> Further, a district court held that even when administrative actions are ongoing at state-level, citizen suits are not barred.<sup>96</sup> The exact action must be covered by the exact provision of the statute in order for a claim to be barred.<sup>97</sup>

Even when the EPA has ordered a defendant to perform remedial actions, at least one court has declined to bar a subsequent citizen suit that sought relief for violations occurring at different locations and involving different contaminants.<sup>98</sup> Still, courts seem to want to expand the boundaries of the bar.<sup>99</sup> Further, courts similarly held claims that government action “[in]effectively remedied” damages caused by defendants were not enough to overcome the the bar.<sup>100</sup> Even where the docket of a state court is proceeding slowly, the bar will block citizen suits when some type of settlement discussion is ongoing.<sup>101</sup> Existing EPA administrative orders already carried out will bar claims, despite the general holding that administrative action from the EPA will not stop a claim.<sup>102</sup>

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93. See *Colorado*, 990 F.2d at 1580 (finding CERCLA actions do not encompass remedial methods under RCRA).

94. See *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 34 (1st Cir. 2011) (defining bar as discrete statutorily enumerated list of actions).

95. See *Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 13 (1st Cir. 2009) (ruling different remedial obligations arise from different types of contaminants).

96. See *Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1025-26 (S.D.N.Y. 1994) (finding state administrative action is not action to which bar applies).

97. See *Sanchez*, 572 F.3d at 13 (specifying narrow manner of barred suits).

98. See *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1539 (M.D. Pa. 1985) (stating action is not barred as it adds to EPA action in lieu of replicating it).

99. See *Board Of Cty. Comm'rs of La Plata v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1200 (D. Colo. 2009) (criticizing plaintiff's citation of *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 2d 1398 (E.D. Wis. 1992)).

100. See *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp. 1401, 1407-08 (N.D. Ohio 1987) (preventing claim where EPA has taken action of some type).

101. *Hudson Riverkeeper Fund v. Harbor at Hastings Assocs.*, 917 F. Supp. 251, 256 (S.D.N.Y. 1996) (reasoning Congress was aware state dockets were slow and made no exception for application of diligent prosecution bar).

102. See *LeClercq v. Lockformer Co.*, No. 00C 7164, 2002 U.S. Dist. LEXIS 8092, at \*14 (N.D. Ill. 2002) (finding administrative order entered and claim blocked due to it).

## II. POLISHING COAL FOR DIAMOND: ANALYZING THE DILIGENT PROSECUTION BAR

Supporters of the diligent prosecution bar justify its use with the underlying view that the government is best suited to tackle environmental protection and that regulation should be the primary avenue of controlling environmental problems.<sup>103</sup> Courts consider private citizen suits secondary and believe they should only be used to enforce a claim if the government has failed to do so.<sup>104</sup> Another justification that legal scholars assert is that citizen suits serve as a form of free riding: the government investigates and then a private citizen tacks a suit on to reap monetary benefits without doing the legwork.<sup>105</sup>

Despite these assertions, the government is regularly to blame for causing pollution.<sup>106</sup> The Gold King Mine case is only one recent example where the EPA is directly responsible for causing destruction to the environment.<sup>107</sup> Additionally, even where the government is enforcing an action against a separate violator, a citizen is often left without recompense for the harm they experienced.<sup>108</sup> The EPA will enforce a fine or an injunctive order against the entity, and then the entity will continue to violate the law, leaving the private citizen without a course of action to be made whole.<sup>109</sup> The goal of environmental protection and protecting citizens from harm is not served by preventing suits for these harms.<sup>110</sup> To support the argument for reexamination of the dili-

103. See *supra* notes 32-102 and accompanying text (describing analytical background to evaluate diligent prosecution bar precedent).

104. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) (arguing position citizen suits are supposed to support government action).

105. See Appel, *supra* note 24, at 91 (describing argument in support of stringent prosecution bar).

106. See generally Corinne Roels et al., *Military bases' contamination will affect water for generations*, CTR. FOR PUB. INTEGRITY (Aug. 18, 2017), <https://www.publicintegrity.org/2017/08/18/21105/military-bases-contamination-will-affect-water-generations> (describing massive contamination of soil and groundwater at 149 current and former domestic military installations).

107. See Shankar Vedantam, *New EPA Mercury Rule Omits Conflicting Data*, WASH. POST Mar. 22, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A55268-2005Mar21.html> (describing EPA suppressing study on mercury emissions conflicting with their results).

108. See *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp. 1401, 1407-08 (N.D. Ohio 1987) (ruling against plaintiff despite claims of continual harm).

109. See *Hudson Riverkeeper Fund v. Harbor at Hastings Assocs.*, 919 F. Supp. 251, 256 (S.D.N.Y. 1996) (preventing suit despite admitting continual violation of injunctive order).

110. *Contra id.* (granting defendants' motion to dismiss citizen suit). Rather, the court took note of the policy concerns that the duty of enforcing compliance with a permit or regulation lies exclusively within the purview of the state. *Id.*

gent prosecution bar, this section of the Comment will first examine instances of the government causing pollution.<sup>111</sup> The second section will examine other instances in which the government is not the source of pollution, but enforces the diligent prosecution bar prohibiting private claims.<sup>112</sup>

#### A. Government Pollution

The United States federal government, state, and local governments all contribute to pollution and environmental damage.<sup>113</sup> The Flint Water Crisis is a recent, notable example of a municipality causing environmental harm.<sup>114</sup> More accurately, it was a combination of both Flint's city government and the Michigan state government.<sup>115</sup> To save the government money, officials decided to source water from the Flint River, causing the city water supply to fill with lead and poisoning thousands of residents.<sup>116</sup> Luckily for these residents, they were able to file suit against the governments and officials involved in the incident and reached a settlement benefitting those harmed from the incident.<sup>117</sup> Potential future claimants might not be so lucky if they attempt to seek recovery for their harm as the EPA and Congress continue to enact many policies shielding municipalities from liability and prevent citizens from recovering for harm caused by the municipalities.<sup>118</sup> Though the law of sovereign immunity is distinct from the diligent prosecution bar, the bar's justification fails when the primary enforcer of environmental action is perpetrating environmental harm.<sup>119</sup>

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"[That] a private plaintiff would [maintain] control of the litigation" would be "a result not acceptable to Congress." *Id.* at 257.

111. *See infra* notes 113-150 and accompanying text (analyzing government-caused pollution and impact).

112. *See infra* notes 151-211 and accompanying text (examining applications of diligent prosecution bar detrimental to citizens).

113. *See infra* notes 114-150 and accompanying text (showcasing examples of government polluting environment).

114. *See generally* *Flint Water Crisis Fast Facts*, CNN (Nov. 28, 2017), <https://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html> (detailing timeline of crisis in Flint, Michigan).

115. *Id.* (describing role of both governments in crisis).

116. *See id.* (explaining cost saving measures resulting in sourcing water from Flint River and contaminating water supply).

117. *See* Chris Boyette, *Michigan and Flint Agree To Replace 18,000 Home Water Lines By 2020*, CNN (Mar. 27, 2017), <https://www.cnn.com/2017/03/27/us/flint-settlement/> (laying out details of settlement to fix pipe lines).

118. Appel, *supra* note 24, at 99 (describing ways government protects polluters from liability in private citizen actions).

119. *See generally* Russell Madden, *Government Versus The Environment*, FOUND. FOR ECON. EDUC. (Feb. 1, 1998), <https://fee.org/articles/government-versus-the-environment/>

One might argue this issue is unique to local and state government; however, the federal government continues to allow pollution by lower government entities to go unpunished in many circumstances.<sup>120</sup> The City of Atlanta, for instance, violated the Clean Water Act repeatedly until pollution reached levels the federal government could no longer ignore.<sup>121</sup> An examination of twenty-two miles of Atlanta's sewer system in 1998 uncovered a massive array of problems.<sup>122</sup> Most of the manholes either had "broken rims or missing covers."<sup>123</sup> All of the sewer pipelines were poorly maintained, leaking refuse and overgrown by plant life.<sup>124</sup> Atlanta's creeks were "laden with trash and polluted with high levels of fecal coliform bacteria, indicators of possible disease-causing viruses and bacteria."<sup>125</sup> Though the EPA was responsible for conducting the investigation and prompting the Justice Department to take action against Atlanta, this occurred only after repeatedly allowing Atlanta to break deadlines for fixing the issues with the system over an unknown period of time.<sup>126</sup> The sewer system became a near disaster before the federal government finally stepped in and took action.<sup>127</sup> After the government did take action, the diligent prosecution bar would have stopped any claim a citizen of Atlanta might have had against their city government.<sup>128</sup>

Outside of these individual incidents, state and local governments are, overall, some of the biggest sources of pollution in the

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environment/ (arguing government does more harm to environment than good by regulation).

120. See *infra* notes 121-131 and accompanying text (describing federal complicity in pollution by state and local governments).

121. Appel, *supra* note 118, at 99 (detailing government negligence in enforcing action against City of Atlanta).

122. Charles Seabrook, *Sewer Probe Cites a Sprawling Mess Legal Action Looms: While Atlanta Officials Say Major Repairs Are Under Way, A Federal-State Investigation Calls the Efforts 'Inadequate' and 'Too Slow'*, ATLANTA CONST. October 16, 1997, at C, available at <http://ezproxy.villanova.edu/login?url=https://search.proquest.com/docview/413789023?accountid=14853> (describing issues with Atlanta sewer system).

123. *Id.* (continuing to detail exact extent of Atlanta sewer system negligence).

124. See *id.* (explaining causes of sloppy sewer system).

125. *Id.* (revealing extent of environmental harm to creeks of Atlanta).

126. See *id.* (stating city missed unknown number of deadlines in course of environmental investigation).

127. Seabrook, *supra* note 122 (outlining overall extent of environmental damage to Atlanta's sewer system).

128. See 33 U.S.C. § 1365(b)(1)(B) (preventing claims when government is pursuing action against offender).

United States.<sup>129</sup> Returning to Georgia as an example, public entities are the greatest source of pollution in the state, racking up over fourteen million dollars in fines between 1998 and 2011.<sup>130</sup> The taxpayer must cover the costs of fines levied on their local governments, even while being barred from making claims due to the fact the EPA's aforementioned fines raise the diligent prosecution bar and prevent a private suit.<sup>131</sup>

While many city and state governments cause pollution, they pale in comparison to the world's greatest polluter: the United States federal government.<sup>132</sup> With the use of 500,000 buildings and 600,000 vehicles, the federal government is the country's largest consumer of energy.<sup>133</sup> The federal government's carbon footprint stands at 123.2 million metric tons of carbon dioxide per year.<sup>134</sup> Despite efforts from numerous administrations to lower pollution, the federal government continues to cause environmental havoc.<sup>135</sup> The largest polluter is the United States Department of Defense (DOD), which pollutes "more than the rest of the federal government combined."<sup>136</sup> In fact, the Department of Defense produces more hazardous waste than the five largest U.S. chemical companies combined.<sup>137</sup> Ignoring areas in other countries the DOD has contaminated, there are still 39,000 contaminated areas

129. W.E. Messamore, *The Number One Worst Polluter on Earth Is . . . The U.S. Federal Government*, INDEP. VOTER NETWORK (Apr. 18, 2012), <https://ivn.us/2012/04/18/the-number-one-worst-polluter-on-earth-is-the-u-s-federal-government/> (describing largest sources of pollution in United States).

130. See Aaron Diamant, *Counties and State Among Georgia's Biggest Polluters*, WSB-TV (Nov. 16, 2011), <http://www.wsbtv.com/news/local/counties-and-state-among-georgias-biggest-polluter/241631107> (detailing investigation into state's biggest environmental offenders).

131. See *id.* (noting harm to taxpayers due to government environmental pollution).

132. See Whitney Webb, *U.S. Military Is World's Biggest Polluter*, ECOWATCH (May 15, 2017), <https://www.ecowatch.com/military-largest-polluter-2408760609.html> (describing extent of U.S. military pollution).

133. Lisa Rein, *Government Agencies Make Plans To Reduce Federal Carbon Footprint In Next Decade*, WASH. POST (Sept. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/09/AR2010090906850.html> (detailing resources causing pollution under federal government).

134. Messamore, *supra* note 129 (explaining federal government's environmental impact).

135. See Rein, *supra* note 133 (describing ongoing but failing efforts to reduce pollution).

136. Messamore, *supra* note 129 (laying out extent of Department of Defense pollution).

137. Webb, *supra* note 132 (comparing extent of government pollution with often demonized private pollution). The DOD has polluted locations throughout the world with chemicals including "depleted uranium, oil, jet fuel, pesticides, defoliants like Agent Orange and lead, among others." *Id.*

compromising nineteen million acres the DOD has caused environmental harm to.<sup>138</sup> The environmental havoc is extensive; the DOD has flooded areas with chemicals, ruining the soil and drinking water.<sup>139</sup>

The casualties have been horrendous for foreign entities hosting DOD forces as well.<sup>140</sup> Iraq's agricultural industry was destroyed by U.S. military intervention and the Iraqi people are now "forced to import more than 80 percent of [their] food" from abroad.<sup>141</sup> The Marshall Islands, a frequent site of nuclear weapon testing in the 1940s and 50s, is still contaminated by radiation and, unsurprisingly, residents of the nation and nearby Guam continue to suffer from high rates of cancer.<sup>142</sup>

Less surprisingly, the U.S. government has been reluctant to allow claims for environmental harm.<sup>143</sup> Despite confirming the Marine Corps contaminated water at a base in North Carolina in the 80s, the government only began to process claims in the early part of 2017 after decades of litigation.<sup>144</sup> The environmental harm

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138. Alexander Nazaryan, *The US Department of Defense Is One of The World's Biggest Polluters*, NEWSWEEK (July 17, 2014), <http://www.newsweek.com/2014/07/25/us-department-defence-one-worlds-biggest-polluters-259456.html> (describing land area polluted by federal government).

139. See Webb, *supra* note 132 (explaining harm to soil and ground underneath DOD buildings and installations).

140. See *id.* (surveying harm suffered by foreign entities due to DOD pollution).

141. *Id.* (describing destruction of Iraqi soil and results therein).

142. See Div. of Cancer Epidemiology & Genetics, *NCI Dose Estimation and Predicted Cancer Risk For Residents of The Marshall Islands Exposed To Radioactive Fallout From U.S. Nuclear Weapons Testing at Bikini and Enewetak*, NAT'L CANCER INST., <https://dceg.cancer.gov/research/how-we-study/exposure-assessment/nci-dose-estimation-predicted-cancer-risk-residents-marshall-islands> (last visited Nov. 3, 2018) (describing extent of cancer in population of Marshall Islands). The NCI investigators concluded "as much as 1.6% of all cancers among those residents of the Marshall Islands alive between 1948 and 1970 might be attributable to exposure from U.S. nuclear testing fallout." *Id.*

143. See Richard Sisk, *VA To Begin Processing Camp Lejeune Toxic Water Claims*, MILITARY.COM, <https://www.military.com/daily-news/2017/02/25/va-to-begin-processing-camp-lejeune-toxic-water-claims.html> (last visited Feb. 28, 2018) (detailing decades of litigation preceding Veteran Administration's (VA) acceptance of disability claims from those affected).

144. *Id.* (stating VA would accept claims for eight presumptive conditions beginning in March 2018). The EPA listed Camp Lejeune, a base in North Carolina, as a toxic Superfund site in 1989 after three potential decades of water pollution. *Id.* The VA battled claims from soldiers for decades before finally promulgating a rule in the Federal Register allowing those who served at the base during the period in which pollution occurred to file claims. *Id.* The VA claims the rule is historic as it is one of the few instances of stateside soldiers being allowed to make disability claims. *Id.*



caused by the DOD continues to receive little scrutiny.<sup>145</sup> In May 2017, the Associated Press met news that a Naval station in Virginia Beach spilled more than 94,000 gallons of jet fuel into a waterway located less than a mile away from the Atlantic Ocean with an eight-sentence article.<sup>146</sup> Even some of the harshest critics of U.S. military overreach, such as Senator Bernie Sanders, note nothing about the environmental harm the DOD has caused and continues to cause.<sup>147</sup>

Despite the ideals of the government serving to prevent environmental harm, citizens are left with a different reality the diligent prosecution bar does not acknowledge.<sup>148</sup> For all of the Supreme Court's claims the citizen suit is secondary to the government enforcement of environmental protection, the government's track record on pollution leaves that policy questionable.<sup>149</sup> Courts should give citizen suits more leeway to move forward given the government's history of environmental destruction.<sup>150</sup>

#### B. Inadequacy of Government Prosecution

Even where the EPA or state government brings an action, the private citizen may not be best served by this action.<sup>151</sup> Government regulation does not directly compensate the harmed party

145. See generally Webb, *supra* note 132 (noting lack of response to DOD pollution around world); W.E. Messamore, *supra* note 129 (stating little notice or protest from media regarding federal government pollution).

146. Navy: Significant Amount of Jet Fuel Leaked at Base, AP (May 11, 2017), <https://apnews.com/ad3921277f4b4f1bb4fc098df3d43748/Navy:-%22Significant-amount%22-of-jet-fuel-leaked-at-base> (touching briefly on news of Navy jet fuel spill).

147. See generally Niv Elis, *Sanders Blasts GOP Push To Increase Military Spending*, THE HILL (Sept. 21, 2017), <http://thehill.com/policy/finance/351765-sanders-blasts-gop-push-to-increase-military-spending> (lambasting Republicans for military spending increases while failing to include environmental harm among criticisms). Bernie Sanders is a U.S. Senator from Vermont who has protested military intervention in the Middle East repeatedly, though noting nothing about the environmental impact of this intervention. Bernie Sanders, *International Relations*, BERNIE SANDERS: U.S. SENATOR FOR VERMONT, <https://www.sanders.senate.gov/legislation/issue/international-relations> (last visited Nov. 3, 2018).

148. See *supra* notes 113-147 and accompanying text (elaborating upon pollution by federal, state, and local governments).

149. See Russell Madden, *Government Versus The Environment*, FOUND. FOR ECON. EDUC. (Feb. 1, 1998), <https://fee.org/articles/government-versus-the-environment/> (showcasing government policies harming environment and rights of citizenry in pursuing environmental protection).

150. See *id.* (questioning basis for government to regulate environment given harm it causes).

151. See *infra* notes 152-211 and accompanying text (detailing unsatisfactory results for citizens from government environmental regulation).

who bears the brunt of the environmental harm.<sup>152</sup> While it may lead to the regulated entity eventually ceasing the harm, this does not provide a remedy for all the past wrongs already endured by the citizens.<sup>153</sup> The regulated entity might still persist in violating the EPA order, resulting in continued harm to the citizen.<sup>154</sup> Despite the continued violation, courts will find citizen suits excessive, as an order is already in place or action already pursued in court.<sup>155</sup> The citizen may find little comfort in this logic where their waterways continue to be polluted.<sup>156</sup>

The Supreme Court concluded that allowing citizen suits in certain circumstances would curtail the discretionary ability of the federal government.<sup>157</sup> A hypothetical posed by the Court suggested that allowing a citizen to pursue a lawsuit after the EPA already cut a deal with the violator would limit the government's available courses of action in pursuing a violator, since the violator would have less incentive to work with the government if they could be sued even after making a deal.<sup>158</sup> Given the secondary nature citizen suits are supposed to serve, the Court determined this would be an unacceptable result.<sup>159</sup>

Some legal scholars also argue in support of the secondary role of citizen suits, as they believe the government has superior resources and the proper expertise to know when to negotiate with a violator or pursue a more aggressive action.<sup>160</sup> An additional argument is a defendant is more likely to negotiate with the government

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152. See Appel, *supra* note 24, at 101 (noting government action enforces fines, which are collected for government use).

153. See *id.* at 102 (implying citizens would get little out of increased government enforcement).

154. See *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., LLC*, 500 F. Supp. 2d 592, 606 (E.D. La. 2007) (forbidding private claim despite monthly violations of EPA order).

155. *Id.* (arguing EPA order was already in place and private action would be redundant).

156. See Susan Buchanan, *U.S. Eyes European Safety Standards for Oil Refineries*, HUFFINGTON POST (Apr. 14, 2014), [https://www.huffingtonpost.com/susan-buchanan/us-eyes-european-safety-s\\_b\\_5150307.html](https://www.huffingtonpost.com/susan-buchanan/us-eyes-european-safety-s_b_5150307.html) (noting Chalmette Refining had seventy spills and releases from 2012-2014).

157. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987) (arguing bar prevents citizen suits from being intrusive and taking away decision-making from federal and state governments).

158. See *id.* at 61 (describing hypothetical enforcement where citizen would disrupt Administrator plan if allowed to sue).

159. See *id.* (stating Congress did not intend result of citizen suits becoming potentially intrusive).

160. Appel, *supra* note 24, at 101 (arguing diligent prosecution bar makes sense when government action is already occurring).

if it knows future suits will be barred.<sup>161</sup> Further, if the only result is a larger fine against the violator, the additional benefit to the environment may be minimal.<sup>162</sup> Political support for environmental cases may also be weakened if they are seen as only existing to generate attorney's fees.<sup>163</sup>

The EPA does spend more time pursuing environmental ends than the average citizen and has access to greater wealth.<sup>164</sup> A defendant is probably more likely to work with the government if future suits can be prevented.<sup>165</sup> But this ignores the proposition that many private firms specialize in environmental law and have dedicated their entire practice to it.<sup>166</sup> The argument that allowing citizen suits to proceed might disrupt government negotiations rests on the logic that government negotiation is inherently superior, creating a circular reasoning fallacy.<sup>167</sup>

This Comment has previously demonstrated examples of the government's shortcomings in handling environmental issues.<sup>168</sup> Another example exists in *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage District*.<sup>169</sup> There, the municipal entity in charge of managing sewage repeatedly violated a discharge permit and released hundreds of gallons of raw sewage into the rivers of the city.<sup>170</sup> The local government and Wisconsin state government en-

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161. *Id.* (describing logic in support of argument that action would prevent settlements). The author argues that a violator open to potential suit wouldn't negotiate and instead try to save its wealth for future litigation instead of spending it on cleanup efforts. *Id.*

162. *See id.* at 101-02 (suggesting result of higher administrative fine could benefit other sources of government spending like military).

163. *Id.* at 102 (describing potential view of citizen suits as low-hanging fruit).

164. *See FY 2019 Budget*, U.S. ENVTL. PROT. AGENCY (last visited Feb. 28, 2018) <https://www.epa.gov/planandbudget/fy2019> (noting potential fiscal year 2019 budget of six billion for EPA).

165. *See Appel*, *supra* note 160, at 101 (presenting logic in support of future suits deterring settlement between government and violator).

166. *See generally Practices*, MANKO, GOLD, KATCHER, & FOX, <https://www.mankogold.com/practices.html> (last visited Nov. 3, 2018) (describing extensive environmental practice of firm).

167. *See* Craig Rusbult, *Definitions of Circular Reasoning (Begging The Question)*, AM. SCI. AFFILIATION, <http://www.asa3.org/ASA/education/think/circular.htm> (last visited Nov. 3, 2018) (defining circular reasoning as stating conclusion as proof of conclusion).

168. *See supra* notes 113-150 and accompanying text (detailing instances of government causing environmental harm).

169. 382 F.3d 743, 748 (7th Cir. 2004) (deciding case between local government and citizen environmental group).

170. *See id.* at 748-49 (describing history of government agency dumping sewage into Lake Michigan and rivers around Milwaukee).

tered into an agreement to solve the problem.<sup>171</sup> Thirty years later, the problem remained unresolved, prompting the suit.<sup>172</sup> This issue prompted another agreement between state and local government, which became the basis for the district court to terminate the citizen action.<sup>173</sup> The Seventh Circuit Court of Appeals was skeptical that the action truly was a diligent prosecution after looking at the evidence, and remanded the case back to the district court.<sup>174</sup> The case would ultimately be dismissed.<sup>175</sup>

The environmental damage caused by state governments goes beyond simple isolated cases.<sup>176</sup> Legal scholars find support for the notion that state governments systemically use litigation to shield polluters from private claims.<sup>177</sup> One national environmental advocacy group disbanded its entire litigation program due to this trend, finding it impossible to maintain the practice due to the lack of success in pursuing claims.<sup>178</sup> Additionally, the EPA created policies shielding municipalities from liability under CERCLA.<sup>179</sup> One example can be found in *United States v. Dart Industries*.<sup>180</sup> In *Dart Industries*, the defendant corporations were being sued by the U.S. government for generating hazardous waste material on a site in Fort Lawn, South Carolina.<sup>181</sup> Dart Industries raised a third-party defendant defense claiming the South Carolina Department of

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171. See *id.* at 749 (explaining stipulation entered into by state of Wisconsin and local government agency). This stipulation would admit to more than sixty violations of their permit without requiring them to pay any penalties or fines. *Id.*

172. See *id.* at 750 (noting plaintiff's observations and subsequent basis for suit).

173. See *id.* at 751 (describing new stipulation entered into during plaintiff's suit and district court's subsequent action).

174. See *Friends of Milwaukee's Rivers*, 382 F.3d at 765 (ruling findings were unclear and remanding for further determination of issue).

175. See *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, No. 02-C-0270, 2007 U.S. Dist. LEXIS 91909, at \*31 (E.D. Wis. Dec. 14, 2007) (finding further evidence did not allow suit to continue forward).

176. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1648 (1995) (describing habitual practice of states litigating to shield polluters from liability).

177. See *id.* (describing trend of state starting litigation only after citizen suits have begun).

178. *Id.* at 1648-51 (describing repeated preemption of suits brought by National Resources Defense Council and subsequent dissolution of its litigation department).

179. Appel, *supra* note 24, at 99 (describing efforts by EPA and United States Congress to shield municipal governments from costs of cleaning environmental damage by statute).

180. See generally *United States v. Dart Indus.*, 847 F.2d 144 (4th Cir. 1988) (dismissing claims of defendant and holding liable).

181. See *id.* at 145 (explaining factual background of case).

Health and Environmental Control (DHEC) allowed previous owners of the site to store hazardous waste and issued permits for it.<sup>182</sup> Under Dart's theory, the DHEC would have counted as an owner and operator who controlled activities on the site.<sup>183</sup> The Fourth Circuit Court of Appeals found DHEC "approved or disapproved applications to store wastes at Fort Lawn, inspected the site," and went as far as to ensure wastes were properly transported to the site.<sup>184</sup> Despite these findings, the court held the DHEC's actions did not constitute ownership under the statute and the DHEC could not be held liable.<sup>185</sup> The court even conceded the DHEC likely was negligent in enforcing the state environmental regulations.<sup>186</sup>

Government failures are not the only ones shielded from claims, as agricultural interests are also protected from liability for environmental damage.<sup>187</sup> As noted by one legal scholar, "nearly every major federal environmental statute exempts production agriculture."<sup>188</sup> Farms are commonly among the most prolific agents of environmental degradation.<sup>189</sup> The natural habitats around farms are thrown out of balance due to the combination of chemicals produced by farming and the alterations to the natural nutrients in the area.<sup>190</sup> The leading cause of soil erosion in the United States is farming, as nearly a third of all farmland is considered highly erodible.<sup>191</sup> Furthermore, the animal wastes from farms combined with the agrochemical releases farms produce are all major pollutants and sources of environmental harm.<sup>192</sup> Farming also remains one

182. *Id.* (raising defense by asserting liability on part of another party). CERCLA provides a third party defense, allowing the defendant to escape liability, provided they prove a third party caused release of the hazardous substance. 42 U.S.C. § 9607(b)(3) (2012).

183. *See Dart Indus.*, 847 F.2d at 146 (arguing DHEC should be held liable as owner and operator of site).

184. *Id.* (detailing involvement of DHEC at site in question).

185. *Id.* (ruling DHEC cannot be found liable under third party defense).

186. *Id.* (noting DHEC's management of site likely was inadequate).

187. *See Appel*, *supra* note 24, at 99 (asserting law is protective of agricultural interests potentially explaining lack of suits against such interests for CWA violations).

188. *See* John Davidson, *Conservation Agriculture: An Old New Idea*, 9 NAT. RESOURCES & ENV'T 20, 20 (1995) (discussing statutory protection of agriculture).

189. *See* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 274-92 (2000) (surveying various environmental harms caused by farming).

190. *See id.* at 277 (describing loss of habitat caused by farming and disruption to ecosystems).

191. *Id.* (detailing loss of soil organic matter leading to erosion).

192. *See generally id.* at 282-287 (describing variety of environmental harms caused by farming).

of the major sources of greenhouse gases as the combination of fertilizer and chemicals from animal waste contribute to lesser air quality.<sup>193</sup>

Despite these clear instances of agricultural pollution, citizens attempting to sue farms for water pollution under the Clean Water Act (CWA) run into the roadblock of government interpreting the law to defeat these suits.<sup>194</sup> This is more than a matter of courts occasionally interpreting law in an unfavorable manner, as the EPA deliberately acted to shield farms from liability.<sup>195</sup> Within the CWA is a provision establishing a permitting program called the National Pollutant Discharge Elimination System (NPDES), which is aimed at limiting private pollution discharges.<sup>196</sup> The NPDES only allows permits when the pollutants remain under a certain level, which most farming discharges would not qualify under.<sup>197</sup> The EPA promulgated an administrative exception rather than attempting to issue permits to the nation's two million farms.<sup>198</sup> Though the courts struck this down as clearly against the intent of the CWA, Congress overrode the courts and codified the exemption.<sup>199</sup>

Citizens seeking to bring action outside of statutory environmental law will also find it difficult to bring common law claims.<sup>200</sup> All states have laws shielding farms from common law nuisance suits.<sup>201</sup> Some may argue farms deserve a shield from liability considering their economic and social benefits and deep roots in American culture.<sup>202</sup> Yet many citizens harmed by agriculture are

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193. *See id.* at 291-92 (detailing types of air pollution emissions resulting from farming).

194. *See Appel, supra* note 24, at 100 (describing pollution from farms being protected from liability). Farm pollution largely results in runoff, which, as non-point source pollution, makes it difficult to prove liability under the current legal framework. *Id.*

195. *See Ruhl, supra* note 189, at 294 (detailing EPA efforts to protect farms from permitting system).

196. *Id.* (describing statutory creation of permit system and how it functions).

197. *See generally* 33 U.S.C. § 1342(a) (2012) (creating permitting system and requirements therein).

198. Ruhl, *supra* note 189, at 294 (describing EPA effort to circumvent issuing permits to farms).

199. *Id.* (detailing history of legislative solidification of agricultural immunity); *see also* Fed. Reg. 18,000, 18,003 (1973) (excepting agriculture from needing NPDES permit).

200. *See id.* at 315 (describing farms' safe harbor from common law claim of nuisance).

201. *Id.* at 315-16 (demonstrating extent of shield farms have from common law liability).

202. *Id.* at 265 (suggesting reasons farms receive extensive shield from liability and escape scrutiny).

left without a means to make a claim.<sup>203</sup> The history of government enabling environmental harm, if not being the direct cause of it, questions the premise that government is the entity best suited to police environmental matters.<sup>204</sup>

The federal government does not completely turn a blind eye to the inefficiency of state government.<sup>205</sup> Occasionally, the federal government will support citizens when they claim a state government is not properly prosecuting a claim.<sup>206</sup> Yet this has created federalism issues where federal judges have to judge state level executive action for diligence.<sup>207</sup> Judges express discomfort with having to decide what level of state action meets the requirements of the bar.<sup>208</sup> The first draft of the citizen suit provision of the Clean Air Act contained no diligent prosecution bar, making it likely legislators were potentially aware of these issues.<sup>209</sup> Supporters of the bar may cite federal intervention into state affairs as a positive development and as proof government is best suited to handle environmental issues.<sup>210</sup> Given the federalism issues and the national government's own mistakes, the grounding for the bar is questionable.<sup>211</sup>

### III. CLEARING OUT THE RUBBLE: THE FUTURE OF THE DILIGENT PROSECUTION BAR

The EPA's mishap at the Gold King Mine is far from an isolated incident.<sup>212</sup> This environmental disaster is another incident

203. See *supra* notes 32-102 and accompanying text (detailing extensive bars of environmental acts and private actions blocked by them).

204. See *supra* notes 169-203 and accompanying text (detailing past instances in which government acquiesced or failed to address environmental damages).

205. See Appel, *supra* note 24, at 102 (describing federal government's reservation of right to over file case).

206. *Id.* at 103 (explaining instances where federal government has supported citizen suits against state agencies for lack of diligent prosecution).

207. See *id.* (describing federalism issues federal judges are faced with in deciding cases).

208. *Id.* (suggesting judges may even feel incompetent to properly decide these issues).

209. See *id.* (noting lack of federalism issues in original draft of amendments to Clean Air Act).

210. See generally Meredith Medoway, *Why The Federal Government, Not States, Should Regulate The Environment*, MIC (Feb. 11, 2012), <https://mic.com/articles/4090/why-the-federal-government-not-states-should-regulate-the-environment#.mk7Z2M4hp> (arguing federal legislation protects environment best).

211. See *supra* notes 113-210 and accompanying text (detailing government mistakes in regulation and judge's struggles with federalism issues).

212. See *supra* notes 1-211 and accompanying text (surveying diligent prosecution bar in light of Gold King Mine disaster).

in a history of governmental negligence, if not willful ignorance.<sup>213</sup> Congress designed the diligent prosecution bar in environmental statutes to ensure private citizen action remained secondary to the actions of government.<sup>214</sup> Reality tells a different story than ideals when, in practice, government itself pollutes or shields polluters from the claims of citizens harmed by their environmental damage.<sup>215</sup>

Whether the diligent prosecution bar should continue to exist given this reality is a question worth answering.<sup>216</sup> The goal of efficient environmental protection is arguably not being served when government action often develops a middle ground of allowing some degree of pollution to continue as long as government maintains control of the regulation.<sup>217</sup> Citizens harmed by pollution have repeatedly felt shortchanged by underwhelming state regulation that bars private action, even where the state action falls short of actually ending the harm to the environment.<sup>218</sup> At least one legal scholar argued citizen suits that merely mimic successful government enforcement are excessive and a waste of resources.<sup>219</sup> The additional benefit to the environment would be minimal, at least where a federal court simply levies a larger fine and places it into a general treasury fund.<sup>220</sup> This argument ignores the individual citizens harmed by environmental damage, who arguably deserve to be made whole in some manner.<sup>221</sup> Further, given the government's tumultuous history of environmental protection, this argument may actually show more support for abandoning govern-

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213. See *supra* notes 113-210 and accompanying text (describing incidents of government polluting environment and shielding polluters from liability).

214. See *supra* notes 43-45 and accompanying text (examining legislative history to determine bar designed to make citizen suits secondary).

215. See *supra* notes 113-210 and accompanying text (elaborating upon government history of negligence and acquiescing in pollution).

216. See *infra* notes 217-251 and accompanying text (examining necessity of diligent prosecution bar given flaws).

217. See, e.g., *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., LLC*, 500 F. Supp. 2d 592, 606 (E.D. La. 2007) (admitting continual violation of EPA order but preventing suit from private citizen as government action had commenced).

218. See *id.* (seeking increased action against defendant but prevented by government action).

219. See Appel, *supra* note 24, at 101-02 (arguing three reasons for citizen suits being excessive on top of government action).

220. *Id.* at 101-02 (suggesting additional fines provide no additional benefit to environmental causes).

221. See *id.* at 101 (failing to note outcomes for individual citizens or potential damages claims for them).



ment regulation of the environment entirely and leaving citizen suits as the primary enforcement tactic.<sup>222</sup>

Given the legislative history for the environmental acts containing citizen suit provisions and the Supreme Court's interpretation of these bars, it seems unlikely the Court will abolish the diligent prosecution bar anytime soon.<sup>223</sup> The existence of the EPA and many state level environmental agencies, constituting billions of dollars of government spending, also indicates it is highly unlikely the government will abandon environmental protection as a goal.<sup>224</sup> The courts have resoundingly found this as a proper role of government.<sup>225</sup> The circuit courts' most recent interpretations of the bars continue to narrow the grounds citizens can sue upon.<sup>226</sup> While the bar may remain, the courts can still take action to provide clarity on the exact type of action constituting a bar and provide a clearer pathway for citizen suits moving forward.<sup>227</sup>

The courts continue to struggle with the types of action constituting a bar under environmental statutes.<sup>228</sup> One source of their struggle is the instance where a consent decree is entered.<sup>229</sup> Courts have struggled to define whether a citizen is suing for the same action a consent decree has been entered for or whether the action is a new instance of pollution allowing a citizen to sue.<sup>230</sup> This is an important area for clarity as a citizen may continue to endure harm from environmental damage if a court finds an ex-

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222. See Jonathan H. Adler, *Making The Polluter Pay*, FOUND. FOR ECON. EDUC. (Mar. 1, 1995), <https://fee.org/articles/making-the-polluter-pay/> (suggesting common law remedies provide better solutions to environmental pollution).

223. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) (finding legislative history supports bar making citizen suits secondary).

224. See *generally Health and Environmental Agencies of U.S. States and Territories*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/home/health-and-environmental-agencies-us-states-and-territories> (last visited Feb. 28, 2018) (listing all environmental agencies within country).

225. See *Mississippi Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 182 (D.C. Cir. 2015) (finding Commerce Clause broad enough to allow regulation of environmental danger).

226. Donald Shandy, *Courts Narrow Citizen Suit Potential*, AM. COLL. OF ENVTL. LAWYERS (Feb. 18, 2016), <http://www.acoel.org/post/2016/02/18/Courts-Narrow-Citizen-Suit-Potential.aspx> (analyzing recent decisions as narrowing potential for private right of action).

227. See Appel, *supra* note 24, at 92 (suggesting room to clarify principles of law courts use to analyze diligent prosecution bar).

228. See *id.* at 102 (noting struggle of federal courts to decide meaning of diligent prosecution bar).

229. See *supra* notes 78-81 and accompanying text (discussing courts jurisprudence in regards to consent decrees).

230. See *supra* notes 94-102 and accompanying text (demonstrating level of difference required for suit to be barred).

isting order covers the environmental harm at issue, and they are prevented from bringing action.<sup>231</sup>

Presenting further problems are areas requiring federal courts to determine when a state is diligently pursuing an enforcement action.<sup>232</sup> One example exists in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.<sup>233</sup> The court examined facts such as Laidlaw filing the complaint against itself, paying the filing fee to sue itself, and arranging payment of penalty with the DHEC in one business day.<sup>234</sup> The District of South Carolina found none of these factors inherently proved the prosecution was not diligent.<sup>235</sup> The judge in that case displayed a degree of discomfort in deciding the case, though eventually arriving at the conclusion the prosecution was not diligent.<sup>236</sup> Legal scholars also note federal courts are in need of guidance in this area.<sup>237</sup> The Supreme Court should develop a clear set of factors for courts, both federal and state level, to determine what constitutes diligent prosecution on the part of a government.<sup>238</sup> Clarity would help prevent judges from having to write twenty-five pages of hesitant analysis, such as the judge in *Friends of the Earth*.<sup>239</sup>

One scholar has suggested looking to other areas of law to help create more clarity on whether a prosecution is diligent.<sup>240</sup> Stemming from an ideological basis of adequately representing citizens' interests, the scholar suggests using rule 24(a) of the Federal Rules of Civil Procedure for propriety of intervention as a standard.<sup>241</sup> This rule allows a party to intervene in a suit unless their interests are already represented in the suit, with the low burden to prove their interests are not represented resting on the intervening

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231. See, e.g., *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp. 1401, 1407-08 (N.D. Ohio 1987) (ruling preventing citizen suit despite ongoing harm).

232. See Appel, *supra* note 227, at 103 (describing federal court's reluctance with deciding state court issues).

233. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 890 F. Supp. 470 (D.S.C. 1995) (deciding whether DHEC action constitutes diligent prosecution).

234. See *id.* at 489 (detailing factual background for basis of decision).

235. *Id.* (finding facts insufficient alone to establish lack of diligent prosecution).

236. See *id.* at 498 (qualifying decision to hold DHEC liable multiple times).

237. See Appel, *supra* note 24, at 108 (describing need for clarity moving forward).

238. *Id.* (implying clearer standards would be helpful for future cases).

239. See generally *Friends of the Earth*, 890 F. Supp. at 474-98 (ruling against DHEC with reluctance and detailed examination of legal background).

240. See Appel, *supra* note 24, at 108 (suggesting different area of jurisprudence could serve as model for diligent prosecution bar).

241. *Id.* (arguing parallels should be drawn to civil procedure rules).

party.<sup>242</sup> In the context of citizen suits, this standard could be used to determine if a prosecution is diligent, though instead requiring the defendant to prove the plaintiff's interests are being represented in a prosecution, in lieu of the plaintiff bearing the burden under the civil procedure rule.<sup>243</sup> This standard would solve issues of collusion between government and polluter, as the showing of collusion would likely not constitute a diligent prosecution under the standard.<sup>244</sup> Other factors considered under the standard would be the similarity of arguments between the citizens and government, whether the citizen and government share an interest, and if the citizen could provide evidence the government neglected to provide in its own action.<sup>245</sup>

The suggested standard would likely allow more citizen suits to move forward and have their interests vindicated.<sup>246</sup> This standard is still rooted in the concept citizen suits should be secondary to government action and the primary goals of a citizen suit should be to achieve broader environmental goals.<sup>247</sup> The diligent prosecution bar's existence alone may necessitate courts interpreting the bar in this manner.<sup>248</sup> Despite this ideological basis for the bar, a standard like the one suggested by the legal scholar may cut into the collusion of government and polluter and properly vindicate citizens harmed by the pollution.<sup>249</sup> The best move would be for courts to find a way to move away from treating citizen suits as secondary, given the history of government pollution and collusion, and interpret the bar in a manner increasing the regulatory power of private action.<sup>250</sup> Though the diligent prosecution bar is here to

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242. See FED. R. CIV. P. 24(a) (allowing outside parties to intervene in suit if requirements are met).

243. See Appel, *supra* note 24, at 108 (describing how suggested standard could function).

244. *Id.* (arguing collusion's effectiveness to bar private claim would be lessened under suggested standard).

245. See *id.* at 109 (raising various considerations under potential new standard).

246. See *id.* at 111 (speculating about effect of suggested change to background).

247. See *id.* (stating ideological basis suggested standard is rooted in).

248. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) (stating legislative history supports citizen suits secondary role).

249. See Appel, *supra* note 24, at 108 (arguing collusion would be lessened under suggested standard).

250. See *supra* notes 103-211 and accompanying text (describing reasons for elimination of diligent prosecution bar).

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stay, courts should loosen the restrictions of the bar and allow more citizen suits to move forward.<sup>251</sup>

*Connor R. Adamson\**

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251. *See supra* notes 212-250 and accompanying text (assessing proposed solutions to demonstrated issues created by diligent prosecution bar).

\* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.S.J., Strategic Communications, 2016, West Virginia University.